Her earlier application was based solely on the issue of non-service while in this application she is challenging the second letter of offer of new facilities to the first defendant and the plaintiff's assertion that the second offer supercedes and cancels the previous facilities.

It is my considered view that the third defendant has successfully shown that she has a defence. Of course whether she succeeds or not is not the issue at this stage. The plaintiff's contention that the second offer has nothing to do with third defendant cannot, to my mind, be a valid contention especially when the new offer contained an express condition that "a joint and several guarantee of all the directors be taken". It is not denied that by the date of the second offer third defendant was no longer a director and as such may well be not liable on the guarantee. I agree with the contention of the third defendant that if the second offer is not meant to supercede and cancel the first offer and third defendant is still meant to be liable under the guarantee executed by her on the strength of the first offer why therefore is the necessity to request for a fresh joint and several guarantee of all directors existing as of the date of the second offer?

The issue before me is whether the third defendant has raised some defence. If the plaintiff contends that she has no defence they can still proceed to strike it out under O. 18 r. 19 or proceed for summary judgement under O. 14. As I said I am satisfied that third defendant has raised a defence and therefore I dismiss plaintiff's appeal with costs and confirm the decision of the learned Senior Assistant Registrar.

LAM GOW & ANOR

v.

MAJU-TEKNO SDN. BHD. & ANOR.

HIGH COURT MALAYA, SHAH ALAM
DATO' RANITA HUSSEIN JC
[ORIGINATING SUMMONS NO. 24-668-93]
12 AUGUST 1994

CONTRACT: Sale and purchase of land - Misdescription - Size of land smaller by 25.19% - Whether a material misdescription - Whether there was a substantial failure of performance - Whether there was acceptance by conduct of the reduction in the size of the land - Rescission - Whether contract could be avoided - Contracts Act 1950 s. 76.

By a sale and purchase agreement the plaintiffs contracted to purchase from the defendants a piece of land measuring 258 square metres in area together with a terrace house thereon for RM 72,859. The plaintiffs later discovered that the size of the land only measured 193 square metres i.e smaller by 65 metres. That apart the plaintiffs had also discovered that the land was sited adjacent to a road which was on a steep elevation which, according to the plaintiffs, was something they had not envisaged before executing the contract. The plaintiffs contended that there was a substantial failure of performance on the part of the defendants and on that ground sought to rescind the agreement.

The first defendant, the developer of the land, did not dispute the plaintiffs' averments aforesaid, but contended that by virtue of a compensation clause in the agreement which in effect allowed any reduction in the size of the land to be compensated for, the plaintiffs were not entitled to terminate the agreement. They also alleged that the plaintiffs knew that there was a road next to the land they had purchased as the road was clearly shown in the plan attached to the agreement and therefore it was not open for the plaintiffs to raise that issue herein.

The question for determination was whether the said misdescription in the size of the land and the proximity to the land of a road on a steep hill had so materially affected the subject matter of the agreement as to cause a substantial failure of performance of the contract, thereby entitling the plaintiffs to avoid the agreement.

Held:

[1] Although a compensation clause such as the one incorporated in this agreement appears to reflect a recognition of the fact that initial measurements taken in the zoning of land to be developed in the plans can well differ from measurements taken on site after subdivision of the plots, such a clause should only be used to rationalise minor departures from the initial measurements and not otherwise.

[2] The reduction by 25.19 % in the size of the land had in fact transformed the subject matter of the sale into one which the purchasers herein would not have purchased had they known of the true position at the time of the signing of the agreement. In other words, the difference aforesaid did not give the plaintiffs substantially what they had bargained for.

[3] The facts further showed that the plaintiffs had purposely chosen a corner lot for their single storey terrace house to obtain extra land for their house and the substantial difference in size of the land would certainly defeat that purpose. On this ground alone, bearing in mind that the plaintiff had shown by conduct that they had not accepted the reduction in the size of the land, the plaintiffs must have the right and be entitled to rescission.

[4] The plan as attached to the sale and purchase agreement had not shown any contour lines to indicate that the land and the road were on different levels and therefore the plaintiffs could not be expected to know that. This fact is one which the defendants as the developers ought to have exclusive knowledge of. Notwithstanding that, in the absence of clear evidence showing that the plaintiffs had relied on a clear statement by the defendants to the effect that the road and the house were sited on the same level, there is no ground to treat the plan as a material misdescription.

[Judgment for plaintiffs].

Cases referred to:

Asia Commodity Traders Pte. Ltd. v. Fook Hai Development Pte. Ltd. [1978] 2 MLJ 236 ***(foll)***

Flight v. Booth 131 ER 1160 ***(foll)***

Legislation referred to:

Contracts Act, s. 76

For the plaintiffs - Selvi; M/s. Gooi & Co.

For the defendants - Lim Bee Ting; M/s. Anuar, Hong & Ong

JUDGMENT

Ranita Hussein JC:

The plaintiffs seek to rescind an agreement for the sale and purchase of a piece of land with a terrace house thereon situated at Mukim Cheras, Daerah Hulu Langat. The plaintiffs aver that they had contracted to purchase the land measuring 258 square metres for a price of RM72,859 on 27 June 1990. In July 1992 the plaintiffs discovered that the size of the land was smaller by 65 square metres and it was sited adjacent to a road which was on a steep elevation. They now seek to terminate the agreement.

The first defendant, the developer of the land, does not dispute either the difference in the size of the said land or the adjacency of the road to the land. However, it avers that the plaintiffs are not entitled to terminate the agreement because there is a compensation clause in the agreement (clause 11(1)) which allows any reduction in the size of the land to be compensated monetarily. It further avers that when the sale and purchase agreement was signed by the parties, the plaintiffs knew that there was a road next to the piece of land they purchased as this was shown in the plan attached to the agreement (Schedule I).

The issue is whether or not the misdescription in the size of the land and the proximity to the land of a road on a steep hill have affected the subject matter of the agreement so materially as to cause a substantial failure of performance of the contract or amount to breach of an essential term, whereupon the contract can be avoided.

Counsel for the plaintiffs submits that there is a substantial failure of performance or breach of a fundamental term of the contract entitling the plaintiffs to rescind the agreement and to claim for damages in accordance with s. 76 of the Contracts Act on the following grounds:

(a) the reduction in the size of the land that the plaintiffs had contracted to purchase was substantial, being a reduction of 65 square metres i.e. a reduction of 25.19%; and

(b) the presence of a road on a step slope next to the house presented the danger of vehicles falling on the house - something which was not envisaged by the plaintiffs.

She argues that in the circumstances, the right to rescind can accrue notwithstanding the presence of the compensation clause in the agreement.

The compensation clause, clause 11 in the agreement reads as follows:

> *11. Kedudukan dan keluasan Lot*
>
> (1) Kedudukan lot tersebut berbanding dengan lot-lot lain yang ditunjukkan dalam Pelan Susunatur didalam Jadual Pertama dan ukuran, sempadan dan keluasan lot tersebut seperti yang diberikan dalamnya, adalah dipercayai tetapi tidak terjamin betul dan jika ukuran, sempadan dan keluasan lot tersebut yang ditunjukkan dalam Pelan Susunatur itu berbeza dari ukuran, sempadan dan/atau keluasan seperti yang ditunjukkan dalam dokumen hakmilik muktamad apabila dikeluarkan maka harga beli lot tersebut yang dikira dengan kadar RM80.74 bagi satu meter persegi hendaklah di selaraskan sewajarnya.

A clause such as this appears to reflect a recognition of the fact that initial measurements taken in the zoning of land to be developed and recorded in the plans can well differ from measurements taken on site after subdivision of the plots. However, it is reasonable to expect that the purpose of such a clause would only be to rationalise minor departures from the initial measurements.

In *Asia Commodity Traders Pte. Ltd. v. Fook Hai Development Pte. Ltd.* [1978] 2 MLJ 236, the issue before the court was whether the plaintiffs were entitled to rescind the agreement for the sale and purchase of premises, the size of which was stated as being 1,391 square feet but was subsequently discovered to be 1,888 square feet. The Court held that a discrepancy of 18% in the area of the premises and an increase of RM65,000 in the price of the premises were substantial differences. In holding that the misdescription entitled the plaintiffs to the right to rescind the contract the Court applied the principle in *Flight v. Booth* 131 ER 1160. In that case Tridal CJ said:

> Where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale.

In the present case, the plaintiffs had, on 27 June 1990 contracted to purchase land with a building thereon measuring 258 square metres. They did not discover that the said land only measured 193 square metres until July 1992. Immediately upon such discovery, they wrote to the defendant, complaining of the matter. The circumstances and the plaintiffs' conduct indicate that there was no acceptance of the reduction in the size of the land by the plaintiffs.

The argument by Counsel for the defendants that the reduction in the land area does not affect the built-up area of the house is not relevant to the question of whether there was a material misdescription. The fact that the plaintiffs had chosen a corner lot for their single storey terrace house clearly evidences their desire to obtain extra land for their house. The difference of 25.19% in the size of the land, which in my view is a substantial difference, would certainly defeat their purpose.

To make matters worse was the discovery of the fact that the road adjacent to the plaintiffs' land was sited on the top of a steep slope. Although the road was shown in the plan attached to the sale and purchase agreement, no contour lines or indication of gradients were shown in that plan to indicate that the land and the road were on different levels. This fact is one which I would expect to be within the knowledge of the developers but certainly not of the purchasers. The danger that is posed by vehicles travelling along an unguarded road which is high above adjacent houses is not difficult to imagine. However, in the absence of any evidence showing that the plaintiffs had relied on a clear statement by the defendants or in the agreement to the effect that the road and the house were sited, on the same level, I am not prepared to treat the plan as a material misdescription.

In my view, the reduction by 25.19% in the size of the land alone can be regarded as having transformed the subject matter of the sale into one which the purchasers would not have purchased had they known of the true position at the time of the signing of the agreement. In other words, the difference aforesaid would not give the purchasers substantially 'what they bargained for'.

For the reason above, I find that the plaintiffs have the right to rescission.

Judgment is given to the plaintiffs for rescission and it is ordered that the sum of RM14,659 paid

by the plaintiffs to the defendants be refunded with interest at the rate of 8% and costs. The interest is, as agreed by the parties, to take effect from 3 January 1991 to date of realisation.

It is also ordered that the plaintiffs be entitled to damages on account of the non fulfillment of the agreement, the amount of such damages to be assessed by the senior assistant registrar.

Other consequential orders are granted as prayed.

LEE GA CREDIT & LEASING SDN. BHD.

v.

MAISAH BINTI HAJI MANSOR & 2 ORS.

HIGH COURT BORNEO, SIBU
TUAN STEVE L.K. SHIM J.
[ORIGINATING MOTION NO. 2 OF 1992]
2 JULY 1993

LAND LAW: Registered chargee applying for removal of caveats lodged against land - Application made under s. 177(1) of the Sarawak Land Code - Land sold by public auction - Whether applicant has the locus standi to make the application - Caveats lodged based on agreement by chargor to retransfer property to respondents - Agreement signed after execution of memorandum of charge - Existence of no dealing clause in memorandum of charge - Whether applicant had consented to the retransfer - Whether applicants charge was indefeasible - Consideration of s. 132 of the Sarawak Land Code - Whether charge ranking in priority over the caveats.

The applicant, the registered chargee of a piece of land (the land), applied for the removal of a caveat lodged by the third repondent. The applicant had applied for an order for sale and was the successful bidder at the third auction sale. By way of preliminary objection, the respondents contended that the applicant's *locus standi* to make the application for the removal of the caveats had dissipated by reason of the public auction as the applicant could no longer be considered a registered proprietor or any person having a registered estate or interest in the estate or interest against which a caveat is lodged.

On the substantive application, the third respondent contended that the memoranda of transfer in favour of the chargor was effected as a result of fraudulent representations made to her by the chargor. In this regard the third respondent alleged to the effect that she was under the impression that she was signing a development agreement when in fact it was a sale and purchase agreement. The third respondent subsequently, upon discovering the charge on the land, caused the caveat to be entered on the land relying on an agreement, made between her and the chargor, to retransfer the land to her. This agreement was executed subsequent to the creation of the charge.